EPA Region 10's MS4 Designation and Petition Response Procedures

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Contents

This document describes how EPA Region10 may use its discretion to require otherwise unregulated MS4 discharges in Idaho to obtain authorization to discharge under the Idaho MS4 General Permit.

1.1 Regulatory Background

Certain "small," "medium," and "large" municipal separate storm sewer systems must obtain authorization under a NPDES permit, as defined in federal regulations at 40 CFR 122.26(b)(4)(iv), (b)(7)(iv), or (b)(16).

NPDES regulations also allow EPA (or States authorized to issue NPDES permits) to identify additional stormwater discharges of concern on a local or regional basis- i.e., discharges which are not subject to regulation on a categorical basis nationwide, but which may warrant special regulatory attention.

Agency Actions:

NPDES regulations define EPA's "residual designation authority" as it applies to point-source stormwater dischargers not covered by EPA's Phase I or Phase II rules, giving EPA (and authorized States) the power to require otherwise unregulated facilities to apply for NPDES permits, if the agency deems it necessary.

- 40 CFR § 122.26(a)(1)(v) states:

"(a*) Permit requirement*.

(1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

……. (v) A discharge which the [Regional Administrator or State Director], determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States…..designation may include a discharge from any .. system of conveyances used for collecting and conveying storm water runoff,…….

"The Director may designate discharges … on a system-wide or jurisdiction-wide basis…..[and] may consider the following factors:

(A) The location of the discharge with respect to waters of the U.S…

(B) The size of the discharge;

(C) The quantity and nature of the pollutants discharged …; and
(D) Other relevant factors."

- 40 CFR 122.26 (a)(9)(i)(C) and (D) states:

"(9)(i).….[After] 1994, for those not required to do so via (a)(1), operators shall be required to obtain a NPDES permit only if …
(C) the [Regional Administrator or State Director]determines that stormwater controls are needed for the discharge based on wasteload allocations that are part of ``total maximum daily loads'' that address the pollutant(s) of concern, or
(D) the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States."

- 40 C.F.R. § 122.32(a)(2) gives EPA authority to designate small MS4s based on whether the discharge results in exceedances of water quality standards, including impairment of designated uses or other significant water quality impacts [*see also* §123.35(3)].

- The NPDES permitting authority may also designate any small MS4 that substantially contributes to the pollutant loadings of an NPDES-regulated municipal separate storm sewer [*Id.* at § 123.35(4)]

Agency Designations Resulting from Petitions from Outside Parties:
The following NPDES regulation allows any member of the public to petition EPA (or authorized States) to make such "residual designations" of municipal stormwater discharges:

- 40 CFR 122.26(f) states:

"(f) *Petitions.*
(1) Any operator of a [MS4]….. may petition the Director to require a separate NPDES permit (or a permit issued under an approved NPDES State program) for any discharge into the municipal separate storm sewer system.
(2) Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States……..
(4) Any person may petition the Director for the designation of a large, medium, or small municipal separate storm sewer system as defined by paragraph (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section.
(5) The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition with the exception of petitions to designate a small MS4 in which case the Director shall make a final determination on the petition within 180 days after its receipt.

1.2 Relevant Factors

EPA will consider the following factors to be relevant whether to require an otherwise unregulated MS4 to obtain authorization under this Permit. Evaluations will be on a case by case basis, and, at its discretion, EPA may rely on additional facts to evaluate discharges from a candidate municipal separate storm sewer. The list below identifies the factors EPA will typically consider, but is not intended to restrict EPA's exercise of its discretion.

These factors are based on consistent with the IDEQ's draft *Idaho Pollutant Discharge Elimination System Designation Criteria and Selection Process for Small Municipal Separate Storm Sewer Systems,* dated January 2016, and relevant sections of this document are included below.

Factor 1:	**Does the municipal separate storm sewer discharge storm water to impaired or sensitive waters?**

EPA may consider whether the municipal separate storm sewer discharges to impaired or sensitive waters that need protection to maintain or restore uses.

- "Impaired waters" are Clean Water Act § 303(d)-listed water bodies.
- "Sensitive waters" include public drinking water intakes and their designated protection areas; designated public swimming areas; State-designated Outstanding Resource Waters; National Marine Sanctuaries; State Aquatic Reserves; and waters determined to be critical habitat for threatened or endangered species. Discharges of storm water to sole-source aquifers will be considered by EPA Region 10 on a case-by-case basis.

EPA will also consider whether storm water management practices are likely to contribute to the necessary protective and/or restoration measures for the water body of concern, e.g. if the impairment is due to a constituent of concern in storm water. Constituents of concern in storm water typically include: arsenic, cadmium, copper, chromium, lead, zinc, heat, oil and grease, organic toxins, oxygen-demanding organics, nutrients, sediments, bacterial/viral agents and other pathogens.

January 2016 Draft DEQ *Designation Criteria and Selection Process for Small MS4 Guidance says:*

4. Does the MS4 discharge storm water to sensitive waters?

For the purposes of this guidance sensitive waters generally include public drinking water intakes and their designated protection areas; public swimming beaches; shellfish beds; state-designated Outstanding Resource Waters; waters within Federal, State and local parks; and waters containing threatened or endangered species and their habitat.

DEQ will evaluate an MS4s receiving water(s) to determine the presence and proximity of drinking water intakes, public swimming beaches, ORWs, and the presence of threatened or endangered species. MS4s with discharges closer than 1 mile to any of the above listed items may be considered candidates for regulation as a small MS4. Additionally, if the discharge is to sensitive water, DEQ will evaluate the potential for that discharge to have an adverse impact on the receiving water.

Factor 2:	**Is the municipal separate storm sewer a significant contributor of pollutants to waters of the United States?**

EPA will consider designating discharges on a system-wide or jurisdiction-wide basis based on the location of the discharge with respect to waters of the U.S; the size of the discharge; and the quantity and nature of the pollutants discharged.

Municipal storm water discharges specifically identified as "contributing source(s) of pollutants" to a Clean Water Act section 303(d)-listed waterway may be considered as a significant contributor of pollutants to waters of the United States for purposes of designation decisions, unless an EPA-approved Total Maximum Daily Load (TMDL) analysis has determined otherwise.

A municipal storm water discharge that is specifically named and required to reduce loading through an EPA-approved TMDL analysis may be considered a significant contributor of pollutants to waters of the United States. EPA may elect to designate based on the assignment of a wasteload allocation and/or a load allocation contained within an approved TMDL.

EPA will consider whether the activities that take place in the municipal separate storm sewer contribute a loading of pollutants that are considered to be sufficient to cause or exacerbate the deterioration of receiving water quality or instream habitat conditions. This consideration will be based on best available science and readily available information. The types of information or metrics that may be considered and applied include, but are not limited to:

- Water quality monitoring data;
- Landscape metrics such as total impervious surface area, road network density, or number of stream crossings by roads;
- Quantification of the vehicular traffic in the municipal separate storm sewer at levels that would correspond to a high pollutant loading in stormwater discharges;
- Other indications of increased potential for stormwater pollutant loading, including a large non-resident population (such as seasonal or year-round tourism, university students, adjacent military bases, or other types of commuters) or high-use commercial traffic areas.

January 2016 Draft DEQ *Designation Criteria and Selection Process for Small MS4 Guidance says:*

1. *Is the MS4 a significant contributor of pollutants to waters of the United States?*
Municipal storm water discharges that contribute to a violation of water quality standards or are considered a significant contributor of pollutants to waters of the United States will be evaluated as potential candidate MS4s, unless an EPA-approved Total Maximum Daily Load (TMDL) analysis has determined otherwise. Further, a municipal storm water discharge that is specifically named and required to reduce loading through an EPA-approved TMDL analysis shall be considered a significant contributor of pollutants to waters of the United States.

Factor 3:	**Does the municipal separate storm sewer serve a substantial population or area?**

Population density is related to the level of human activity, and directly linked to total impervious land surfaces; impervious surfaces are directly related to pollutant loadings from storm water runoff.

High population growth may be measured by a rate of increase in population, or directly by the number of people added, or by the increase in the amount of impervious surfaces in the municipal separate storm sewer. EPA will evaluate whether the municipal separate storm sewer has experienced high growth by one or more of the following measures:

- Residential population has grown or is projected to grow by a rate of 10% or more within a 10 year period; this applies only to municipal separate storm sewers serving a minimum population of 1,000.
- The municipal separate storm sewer is projected to serve a population of 10,000 or more outside an Urbanized Area, or a population of 1,000 or more inside an Urbanized Area, when the next census takes place.
- The amount of total impervious area served by the municipal separate storm sewer has increased by a rate of 10% or more within a 10 year period; this applies only to municipal separate storm sewers serving a minimum population of 1,000.

EPA's determination will be based on the best available information, including the latest U.S. Census Bureau or State of Idaho's nt data.

January 2016 Draft DEQ *Designation Criteria and Selection Process for Small MS4 Guidance says:*

***3**. Is the MS4 densely populated or have high growth potential?*

Population density is related to the level of human activity, and has been shown to be directly linked to total impervious land surfaces; impervious surfaces are directly related to pollutant loadings from storm water runoff. Densely populated is defined as a population density of at least 1,000 people per square mile. DEQ will consider as candidates for regulation all MS4 applicants with a population of 10,000 or greater and a density of 1,000 people per square mile. Small MS4 below this cutoff will be evaluated regarding their potential as candidate MS4s based on the other criteria outlined here.

High population growth or growth potential means the local residential population has grown by a rate of 10% or more within a 10 year period, based upon the latest Census Bureau information. Small MS4s with high population growth will also be evaluated as potential candidate MS4s.

Factor 4:	**Is the municipal separate storm sewer contiguously located to an Urbanized Area or already regulated municipal storm sewer?**

Jurisdictions that are directly adjacent to a U.S. Census Bureau-defined Urbanized Area will be considered to have potential impacts on a neighboring regulated municipality and shared water bodies

January 2016 Draft DEQ *Designation Criteria and Selection Process for Small MS4 Guidance: See Factor 5 below.*

Factor 5:	**Is the municipal separate storm sewer physically interconnected to another, already regulated municipal storm sewer?**

If a municipal separate storm sewer located outside the Urbanized Area is physically interconnected to another municipal separate storm sewer that is regulated by the NPDES storm water program, and contributes substantially to the pollutant loading in the regulated municipal separate storm sewer, then it must be designated as a "regulated municipal separate storm sewer." To be "physically interconnected," the MS4, including roads with drainage systems and municipal streets, of one entity is physically connected directly to a municipal separate storm sewer of another entity. EPA will determine whether the physically interconnected municipal separate storm sewer contributes substantially to the pollutant loadings of the already regulated municipal separate storm sewer.

To determine whether a physically interconnected municipal separate storm sewer is a "substantial contributor" to the regulated municipal separate storm sewer, EPA will consider the following factors and any other factors EPA determines are appropriate:

- The total contributing area of the candidate municipal separate storm sewer
- What portion of the receiving regulated municipal separate storm sewer's discharge is contributed by the interconnected candidate municipal separate storm sewer; and/or
- What portion of the municipal storm water discharge to the receiving water body is contributed by the interconnected candidate municipal separate storm sewer.

January 2016 Draft DEQ *Designation Criteria and Selection Process for Small MS4 Guidance says:*
2*. Is the MS4 physically interconnected to another MS4 or contiguous to an urbanized area?*

As required by 40 CFR 123.35 (b)(4), an MS4 located outside a UA that contributes substantially to the pollutant loadings of a physically interconnected MS4 already regulated under Phase II must be included in the program. To be "physically interconnected", the MS4, including roads with drainage systems and municipal streets, of one entity is physically connected directly to a municipal separate storm sewer of another entity.

Jurisdictions that are directly adjacent to a U.S. Census Bureau-defined UA will be considered to have potential impacts on a neighboring regulated municipality.

Factor 6:	**Are the water quality impacts of the municipal separate storm sewer already being addressed under other regulations or programs?**

EPA will consider, on a case-by-case basis, whether the storm water runoff from a candidate municipal separate storm sewer is effectively addressed under other regulations or programs, such as the Coastal Zone Act Reauthorization Amendments, the National Estuary Program under Clean Water Act § 320, and/or other non-point source programs.

Information in support of this factor should be provided directly to EPA Region 10 by the candidate municipal separate storm sewer, and should include a description of each of the following elements of the stormwater management program to prevent and minimize pollutant runoff; such descriptions should include budget and staff allotments, scheduled inspection and maintenance activities, and copies of adopted ordinances or other rules supporting the actions:

- Public education and involvement: actions to promote greater understanding and support of stormwater management activities among various audiences within the local community and to involve them in the program planning process.
- Illicit discharge detection and elimination: actions to identify and reduce non-stormwater discharges to the municipal separate storm sewer.
- Construction stormwater runoff control: specific actions to prevent discharge of sediment and other construction-related pollutants from entering the municipal separate storm sewer.
- Post-construction stormwater management: specific actions to control stormwater runoff from new development and redevelopment projects.
- Pollution prevention and good housekeeping for municipal operations: specific actions to reduce pollutant loading in stormwater runoff from publicly-owned roadways, parking areas, maintenance and storage yards, waste transfer stations, parks, and other areas.
- Special actions to address local water quality problems, such as monitoring, retrofitting, or basin planning, being undertaken by the jurisdiction.
- Record-keeping and program evaluation to adaptively manage the program and report to the public on stormwater management activities.

January 2016 Draft DEQ *Designation Criteria and Selection Process for Small MS4 Guidance says:*

5*. Is the storm water runoff from this MS4 effectively addressed by other water quality programs? DEQ will consider, on a case-by-case basis, whether the storm water runoff from a potentially designated MS4 is effectively addressed under other regulations or programs, such as non-point source programs. Information in support of this criterion should be provided directly to DEQ by the candidate MS4.*

1.3 EPA Designation Procedures

EPA will document any decision to designate MS4 discharges from the candidate municipal separate storm sewer as "regulated" pursuant to 40 CFR 122.26(a)(v). EPA's documentation and references will be available as part of the Administrative Record for EPA's designation decision.

- As of May 2016, EPA intends to propose for public comment its tentative decision to designate all MS4 discharges located within the City of Moscow, Idaho, as needing permit coverage. This proposal will occur concurrent with the proposal to issue the Idaho MS4GP. [1]

[1] Cite to current Designation Decision Documents?

If, after the issuance date of the Idaho MS4GP, EPA determines that the discharges from any other candidate municipal separate storm sewer must be regulated, EPA will inform the operator of the municipal separate storm sewer, in writing, that EPA requires them to obtain coverage under the Idaho MS4GP.

- EPA will establish a deadline by which the operator must submit a Notice of Intent for discharge authorization under the Idaho MS4GP. This date will be 180 days from the date of EPA's written notification, unless EPA grants permission for a later date, pursuant to 40 CFR 122.26(e)(5).

- EPA's letter will specify EPA's consideration of the geographic extent of potential permit coverage area for the candidate municipal separate storm sewer system.

Upon receipt and EPA review of the candidate MS4 operator's complete NOI, EPA may subsequently propose for public comment its tentative decision to authorize discharges from the designated MS4 under the MS4GP.

- EPA's will announce in its public notice any decision to modify compliance deadlines for implementing the Stormwater Management Program control measures and/or for requirements related to Part 4 (*Special Conditions For MS4 Discharges to Impaired Waters*), and/or to identify any modified reporting deadlines.

- The NOI and the complete administrative record supporting EPA's affirmative designation decision will be made available for public comment, and EPA will offer an opportunity for public hearing, pursuant to administrative procedures established in 40 CFR 124.

- After considering all public comment received, EPA will issue a final decision regarding the designated MS4's authorization under the MS4GP.

1.4 Petition Response Procedures

Any person or organization may submit a petition in writing to the EPA Director of the Office of Water and Watersheds, EPA Region 10, at the following address:

Director, Office of Water and Watersheds
U.S. Environmental Protection Agency, EPA Region 10
1200 6th Avenue, Suite 900
Mailstop OWW-191
Seattle, WA 98101

In making a determination on a petition, EPA may request additional information from either the petitioner or from the MS4 operator/jurisdiction. EPA will make a final determination on a petition within 180 days of receipt, and will inform both the petitioner

and the operator of the municipal separate storm sewer of its decision, in writing.

- If EPA's final determination on the petition is that the discharges from the candidate municipal separate storm sewer will not be regulated, EPA will inform both the petitioner and the municipal separate storm sewer of the decision, in writing.

- If EPA's final determination is that the discharges from the candidate municipal separate storm sewer will be regulated, EPA will issue a separate letter to the municipal separate storm sewer requiring them to obtain authorization under this Permit as described in Part 1.3 above.